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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 86--

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROY B. BROOKS, LELAND I. AMMONS,
REX L. CAREY, MINNIE L. DAVID,
WILLIAM J. FERGESON, CARL R. GROSS,
BETTY J. REECE AND O. DEAN BRIDGES
PETITIONERS,

V.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR CERTIORARI

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December 8, 1986

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit abused its discretion in refusing to grant petitioners' motions for rehearing of its decision to dismiss petitioners' claims for the stated reason of failure to prosecute their claims under the rules?

2. May a federal circuit court rigidly enforce times for filing of briefs against petitioners, whose attorney has exhibited mental and physical incapacity?

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No. 86-

IN THE
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JURISDICTION

Petitioners seek review of the September 9, 1986, denial of petitioners' motion for rehearing and to vacate the mandates of July 21 and 24, 1986, which motions sought to reverse a June 13, 1986 judgment dismissing the petition for failure to prosecute in accordance with the rules.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

A. Constitutional Provision

The 14th Amendment:

> "No state shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

B. Statutes

Federal Rules of Appellate Procedure
Rules
2, 31(c) and 40.

Local Rule 23, U.S. Court of Appeals for the Federal Circuit.

Federal Rules of Civil Procedure
Rule 60(b)(1) and 60(b)(6).

STATEMENT OF THE CASE

This case was docketed in the United States Court of Appeals for the Federal Circuit on February 6, 1986, and calendered for submission to the Court during the first full week of July-August term, 1986. The petitions sought review of an adverse decision resulting from hearings before the Merit Systems Protection Board.

This is a consolidation of two cases presenting identical facts and questions law for the the Court.

Petitioners' brief in the case was originally due on April 7, 1986. An extension of time was granted on motion to May 7, 1986. On June 13, 1986, without any prior notice to petitioners and without any pending motion to dismiss filed by the Respondent Department of Health and Human Services, the court of appeals entered its judgement, and dismissed the case for failure to prosecute in accordance with the rules.

Within ten days of receipt of the notice of dismissal, petitioners filed a motion for rehearing and to vacate the order of dismissal, and also filed a Motion for leave to file their brief out of time, such motion being accompanied by the briefs. On July 9, 1986, the court

denied petitioners' motions. Petitioners subsequently filed an additional motion for rehearing and to vacate the mandate which was issued by the Court on July 21, 1986. On September 9, 1986, the court of appeals denied this motion. petitioners now seek a review on writ of certiorari to this Court.

The basis for federal jurisdiction in the original appeal to the Merit Systems Protection Board is 5 C.F.R. § 351.901 and § 1201.22.

REASONS FOR GRANTING THE WRIT

The due process issue involved is whether or not the petitioners' "day in court" on the substantive issues will be denied them due to their counsel's conduct which transcended the bounds of professional incompetence, becoming mental incompetence.

Petitioners here contend that the

court of appeals has departed from the accepted and usual course of judicial proceedings, calling for some exercise of this Court's power of supervision. More specifically, petitioners contend that under the factual circumstances presented in this case, refusal of the court of appeals to grant petitioners' motions for rehearing and to vacate the judgment and mandate was an abuse of discretion tantamount to denial of petitioners' due process rights of law.

Petitioners are part of a group of former employees of the Community Services Administration who were adversely affected by the close out and transfer of agency functions to the Department of Health and Human Services on September 30, 1981. Since that time, the eight petitioners here have diligently pursued their claims. Following remand of their individual cases for hearing by the regional offices of the

Merit Systems Protection Board, petitioners followed prescribed appeals procedure. See Certain Former Community Services Administration Employees v. Department of Health and Human Services, 762 F.2d 978 (Fed. Cir. 1985).

The first court action was filed on behalf of the employees in September, 1981, and the individual hearings on remand were conducted by the Dallas Region Merit Systems Protection Board on August 20-23, 1985. Having been unsuccessful in the individual hearing process, petitioners timely filed their petitions for review on November 25, 1985, and the court of appeals set the cases for briefing and submission to the court on February 6, 1986, with a due date for petitioners' brief of April 7, 1986. One extension of time of 30 days was secured by petitioners, and the briefs were actually transmitted to the court of

appeals on June 12 and 20, 1986, accompanied by a motion for leave to file out of time.

While acknowledging that the briefs were thus filed over 30 days after the last due date, petitioners pointed out to the court of appeals that for over five and one-half years, they had diligently, at great personal expense and inconvenience, pursued their claims seeking final determination. To at long last, have them now extinguished due to misconduct of their counsel, for reasons which might be categorized as excusable neglect, to file the briefs in a timely manner petitioners argued, was a denial of fundamental fairness and a breach of due process.

Counsel for petitioners assured the court of appeals that he had been mindful of the extreme importance of complying with the Federal Rules of Appellate Procedure and the courts own local rules, and that his actions had not been in

callous disregard of the need for timely filings and orderly progression of cases through the docket system. Counsel further stated that he deeply regreted the sequence of events that led to this stage of litigation and to the possible disruption of the courts efforts to function smoothly while handling a staggering case load.

Petitioners counsel conferred with counsel for respondents in securing the extension of time. Subsequently, petitioners counsel had numerous conversations with the regional Department of Human Services attorney who had represented respondent in the Merit System Protection Board hearings, and whom he believed to be working with the counsel of record in the court of appeals, and thereby communicating the status of the case. The local DHHS attorney erroneously gave petitioners counsel the impression that the delay in

completing the brief was acceptable to respondent, and in his confused state of mind at the time, he erroneously relied on that impression. By his conduct he never intended to abandon the case, despite apparent setbacks to his attempts to complete the brief in a timely manner. Not knowing of any objection from respondent or the court, counsel completed the briefs and filed them thinking there remained time for the government's response before the court's July-August term consideration of the case.

As petitioners recounted in their Motion to Vacate the Order of Dismissal filed on June 30, 1986, Counsel failed to timely file the brief due to mental and physical illness during the time period in question, and due to severe overextension of his diminished capacity to handle his caseload as a sole practitioner practicing from his residence. These situations

coalesced to reduce counsel to a deep depressive mood debilitating his normal functioning, including his ability to meet longstanding deadlines. (See Appendix "A" - Affidavit of Prior Counsel at 25.) Although counsel was finally able to emerge from this state of emotional exhaustion in order to finish and submit the briefs in the two cases consolidated here, several symptoms of his true mental state remained, which were unknown to petitioners at that time. In addition to the eight petitioners here, ten other appellants had also retained him as counsel to perfect appeals to the court of appeals from their adverse hearing results in the regional hearings conducted by the Merit Systems Protection Board. The rights of all these ten to a hearing were lost immediately when counsel did not timely file a petition for review.

Respondent, in its opposition to petitioners' motion for leave to file the brief out of time, argued the proposition that the petitioners "cannot avoid the consequences of the actions or omissions of their freely chosen representative." Petitioners understand that they must be judged through their representative and that he alone speaks for them. Petitioners asserted however, that while recognizing the need for timely filings, the draconian remedy of dismissal, for their counsel's failure, without any consideration of the merits of their claim was overly severe under the circumstances. See United States v. Raimondi, 760 F.2d 460 (2nd Cir. 1985). None of the cases cited by respondent were comparable to the facts in this case. In Weston v. The Department of Housing and Urban Development, 724 F.2d 943, 951 (Fed. Cir. 1983), the court of appeals upheld the dismissal

of a government employee who refused to cooperate in an internal agency investigation on advice of counsel, despite various safeguards and offers of immunity. The court did not accept the appellant's claim of error by his counsel in the advise given not to cooperate as adequate grounds for his actions.

In _Massingale_ v. _Merit Systems Protection Board_, 736 F.2d 1521 (Fed. Cir. 1984), the court of appeals dismissed as untimely an appeal from the Merit Systems Protection Board which was filed some _two years_ (emphasis added) after the appellant's removal from his government position. Appellant attempted to rely on his union's advice as to the proper appellant route to follow, and thereby failed to file an appeal during the statutory period. Timely filing of an appeal was the issue, not the subsequent filing of a brief, which while important, is certainly

not of the same magnitude as the filing of the appeal itself, which is subject to non-discretionary time limitations.

In Link v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1962), the Supreme Court applied the cited rule to a case where the attorney for the appellant failed to attend a pretrial conference in the District Court, and where there was a history of delays and untimely action by the appellant's counsel going back over a six-year period. The Court upheld the dismissal for want of prosecution and the stated circumstances as being within the district court's permissible range of discretion under the facts of the case. In contrast, the petitioners here have assiduously followed the procedural rules in their cases for the last five years, filed their appeals on time, timely appeared for their hearings and timely filed with the court of appeals. The

tardy brief in question, was hardly comparable to the flagrant circumstances set forth in Link, Weston or Massingale.

Similarly, in other cases before the court of appeals, much more patent violations of the procedural rules have occurred, justifying dismissals.

Johnson v. Department of Treasury, 721 F.2d 361, 365 (Fed. Cir. 1983) involved an appellant who had requested two continuances at the Merit Systems Protection Board level, and who was appealing a dismissal after denial of a third request for a continuance and failure to appear at the Board hearing on the scheduled date. Such blatant disregard for timely prosecution of their case was not exhibited by petitioners here.

Dismissal for violation of procedural rules is discussed in Community Coalition for Media Change v. F.C.C., 646 F.2d 613

(D.C. Cir. 1980), where the court of appeals upheld dismissal when it found circumstances reflecting a conspicuous disregard for the rules. Once again, petitioners pointed out that this case is not comparable in severity, scope and magnitude with the infractions cited above.

Petitioners therefore asked the court of appeals to exercise leniency by recognizing the extraordinary circumstances under which the brief was late, and the limited degree of petitioners' errancy, in the context of the ongoing history of the case, Cf. United States v. Raimondi, supra, and therefore grant their motions for rehearing.

The federal district courts are guided in the matter of granting relief from a final judgment by Rule 60 (b)(1) and 60 (b)(6) of the Federal Rules of Civil Procedure, which permit relief for

mistake, inadvertance, and excusable neglect, among other reasons, ((b)(1)), or "any other reasons justifying relief from the operation of the judgment." ((b)(6)). What the courts have said in interpreting those rules is instructive here. For example, in Griffen v. Swim-Tech Corp., 722 F.2d 677 (5th Cir. 1984), the court of appeals discussed Rule 60, relating it to the "incessant command" of the court's conscience that justice be done in light of all the facts, and that mechanical application of the rules not overshadow the substantive issues and the right of claimants to be heard and obtain justice. The district court in Brown v. Clark Equipment Co. 96 F.R.D. 166 (D.C.Me. 1982) noted that the courts have the power to vacate judgments inherently whenever such action would be appropriate to accomplish justice, while the district court in Liberty National Bank & Trust Co. v.

Yackovich, 99 F.R.D. 518 (D.C.Pa. 1982), addressed the balance which it said must be maintained between the conflicting principles that litigation must be brought to an end, and that justice must be done.

Continuing that dichotomy, the Supreme Court in Link, supra, discussed the issue of whether lack of notice of impending dismissal and a chance to remedy the situation before such drastic action is taken violates the Court's sense of due process. The Court noted that the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing on such action might violate due process, depending on the circumstances, citing Anderson National Bank v. Luckett, 321 U.S. 233 (1943). In Luckett, the Supreme Court stated that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard

the right for which the constitutional protection is invoked." Put a different way, the Court in Link stated that the "adequacy of notice turns on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." (320 U.S. 634).

As the brief was being completed in June of 1986, petitioners had no clue that a dismissal was forthcoming. Petitioners were not informed by their counsel that there was a time problem, there was no inquiry from the clerk of the court of appeals concerning the case, and there was no inquiry from respondent's Washington counsel as to the delay and its possible impact on his reply time before the term of court, and finally there was no pending motion to dismiss for failure to prosecute.

Petitioners, of course do not claim a right to notice of impending dismissal for

want of prosecution. Rather, they are saying that the lack of such notice considering the short time period of delay involved in relation to the overall length of the total litigation, given the reasons of the delay and the absence of any evidence of overt and willful disregard of the rules by petitioners, should have weighed in favor of granting lienency to petitioners and might have tipped the scales in favor of granting a rehearing. Had petitioners been noticed of pending dismissal, or if a motion to dismiss had been under consideration, then the failure of petitioners to timely respond would properly call down the ultimate sanction of dismissal, and the court of appeals would have properly exercised its discretion. Such was not the case here. Counsel for petitioners had gone through a period of professional embarassment, ridicule, and personal anguish on behalf

of his clients and himself. The consequences of his actions may indeed signal the end of his professional career, as disgruntled clients in the instant matter pursue bar grievance and malpractice remedies. Petitioners argued to the court of appeals that no good purpose would be further served by allowing the dismissal to stand, and that petitioners should not be forced to be forever denied their hearing on the merits as a consequence of their counsel's disability. The court of appeals turned a deaf ear to these pleas. The briefs in question were subsequently prepared and filed and the court of appeals could have reinstated the case on its docket and proceeded to judgment on the merits, while well serving the ends of justice and not harming the interests of the respondent governmental agency.

Indeed, the granting of a rehearing and restoring the case to the court of

appeals docket would in no way prejudice or injure respondent U. S. Department of Health and Human Services. If uncorrected, respondent agency has unfairly profited as a result of the omissions and disabilities of petitioners' counsel, and thereby has avoided any consequences resulting from a judgment on the merits. Reinstatement would still result in punishment to the petitioners, in having their case delayed several months on the court of appeals docket, in addition to the mental anguish suffered by themselves and their families during this process. Justice would be served by petitioners' claims being ajudged on their own strength, not preemptorally because of a procedural mistake.

SIGNIFICANCE OF THE UNDERLYING ISSUE

This case, on the merits, presents an important issue of the court of appeals

decision in Certain Former CSA Employees, supra at 7, to not follow this Court's holding in Vitarelli v. Seaton, 359 U.S. 535 (1959), that the remedy for harmful error in effecting the separation of federal employees is reinstatement with back pay subject to any further lawful separation order, which cannot then be deemed retroactive. The court of appeals apparently held that lawful remedies available to an individual, Vitarelli, are not available to groups of employees treated similarly by their agency.

The action of the court of appeals in dismissing this appeal for a short lapse in a long chain of litigation, forecloses any further consideration of this matter vitally affecting petitioners welfare, either by the court of appeals itself, or by this Court.

CONCLUSIONS

Petitioners, therefore, ask this Court to apply the rationale set forth in the Link and Luckett cases, supra, and find that, under the circumstances of this case, that the denial of rehearing to these petitioners was an abuse of discretion by the court of appeals, resulting in injustice to petitioners.

For all of these reasons, a writ of certiorari should be granted now and this case should be set for argument.

Respectfully submitted,

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December 8, 1986

APPENDIX "A"

AFFIDAVIT OF PRIOR COUNSEL

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared JOHN M. STOKES, who is known to me to be the person stated, and after having been by me duly sworn, on his oath deposed as follows:

"The statements made in the foregoing Petition for Writ of Certiorari are true and correct to the best of my knowledge and belief.

"The failure to timely file the briefs was not due to any action or failure to act, by the petitioners, but was solely my fault. I was honestly operating under the impression that the government had no objection to the delay

in briefing, and it was in communication with local agency counsel during this period."

"I am very mindful of the need to follow court schedules, and this is the first and only time I have gotten into such a bind that I failed to complete a brief on time. As I stated in the motion to the Court of Appeals, I was greatly overextended by the work I had to do at the time, and was suffering from a series of respiratory illnesses that seriously interfered with my physical capability to handle the workload, and I became very depressed and somewhat non-functional for several months, the severity of which I recognize more in retrospect than at the time. Since I had not received any inquiry or expressions of concern about the briefs from either the Court or the respondent, I was shocked when I received the Orders of

Dismissal. I finished the briefs and filed them as soon as I could. At all times, my attitude and intention was to complete the work and prepare for argument before the court, and it never was my intention to cause any disruption to the

"Further affiant saith not."

John M. Stokes

JOHN M. STOKES

SWORN AND SUBSCRIBED TO BEFORE ME BY John M. Stokes on December 5th, 1986.

Notary Public in and for
the State of Texas

Commission Expires:

[illegible] 23/90

Printed Name of Notary:

[illegible] Hedgecock

S E A L

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Supreme Court, U.S.
FILED
DEC 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-1395

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January 9, 1986

87pp

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January 9, 1986

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

Roy B. Brooks, § Docket Nos.
and § DA03518210294-REM
Israel M. Verver, § DA03518210074-REM
Appellants, §
v. § Date:
Department of Health § October 8, 1985
and Human Services §
Agency. §

Before

William W. Carnes, Presiding Official

DECISION

Appellants filed appeals with the Board from the reduction-in-force (RIF) actions which separated them from employment with the former Community Services Administration (CSA), concurrently with that agency's abolishment, effective September 30, 1981. Each appeal falls within the Board's appellate jurisdiction and is deemed to be

timely filed. 5 C.F.R. §§ 351.901, 1201.221[1/] Based on previous Board holdings in these cases and the findings in this decision, the appealed actions are affirmed.

The Board has previously decided these appeals, in part, in a consolidated decision which remanded the cases to the regional office for a limited purpose. Certain Former CSA Employees v. HHS, 21 M.S.P.R. 379 (1984), aff'd, 762 F.2d 978 (Fed. Cir. 1985). This decision is issued pursuant to those remand instructions. Essentially, it was decided that many, if not abolishment of that agency, notwithstanding improprieties in the way those actions were accomplished. The Board held, therefore, that the appealed actions would be sustained unless the appellants were deprived of a substantive right to be retained in the Office of Community Services (OCS), Department of

Health and Human Services (HHS), that they would have had in a properly conducted transfer of function and RIF. Id. The only remaining issue to be resolved on remand was whether any individual appellant had been "denied retention to which he [or she] was otherwise entitled." 21 M.S.P.R. 379,393-394.

Analysis and Findings

Appellants were afforded a hearing and the opportunity to come forward with claims and evidence to show that they would have been retained if a proper transfer of function and RIF had been conducted.[2] At the hearing, both appellants identified the position of Secretary, (Stenography), GS-7, as one in which they would have been retained. Both claimed a superior retention standing to L. Myers, in tenure subgroup IB, based on their own subgroup standing and they

having previously held a higher-graded position than Myers at CSA. Brooks is in subgroup IA with a service computation date of 3-29-68; Verver is also IA with a service computation date of 8-29-67.

Myers was hired on February 7, 1982, to fill a vacancy left of Olga Beets, a former CSA employee who had been retroactively awarded the GS-7 secretary position as of October 1, 1981, as a part of the CSA transfer of function.[3/] The Dallas office of OCS had only one Secretary (Steno), GS-7, position. The incumbent of that position following the transfer of function was Beets, not Myers. Thus, in order to establish an entitlement to be retained in that position at the time of the RIF, regardless of whether claiming retention entitlement over Myers or Beets, appellants must have a retention standing superior to Beets.

Even though agencies are not required to fill vacancies in a RIF, once a determination has been made that vacancies will be filled by employees affected by the RIF, as here, the RIF regulations must be followed in a consistent manner. See Wilburn v. Transportation, 757 F.2d 269 (Fed. Cir. 1985); Klegman v. HHS, 16 M.S.P.R. 454 (1983); 5 C.F.R. §§ 351.201(b), .704(a). An agency must use subgroup classification to determine retention priorities for assignment to vacancies filled during a RIF. Klegman at 457. An employee's length of service, or earlier service computation date, does not establish a superior entitlement over a fellow employee in the same tenure subgroup for assignment to a vacant position, pursuant to the same RIF. See Harris v. United States, 153 Ct. Cl. 425 (1961); Baker v. Commerce, 19 M.S.P.R. 432 (1984).

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Beets is in tenure subgroup IA, with a service computation date of 1-1-62. Since the appellants are also in tenure subgroup IA, neither has subgroup standing superior to Beets. _See_, _e.g._, [illegible]; 5.C.F.R. § 351.501. Moreover, even if the regulations required that service computation dates be used as the criteria for establishing priorities within subgroups, neither appellant has an earlier service computation date than Beets. There is no provision in the RIF regulations that makes any distinction for previously held grade levels between employees competing for assignment rights to a position at or below their previous representative rate, outside their original competitive level, and for which they are otherwise qualified. _See_ 5 C.F.R. Part 351. Whether the appellants had a greater retention standing than

Myers is not relevant to the competing retention rights at the time of the RIF.

The agency further asserted that neither appellant was considered as qualified for this clerical position. M.J. Davis, HHS Supervisory Personnel Management Specialist, testified that the Personal Qualifications Statement (SF-171_ for each appellant, submitted in response to the agency's request to update their qualifications,[4/] failed to reflect any typing skills. Both appellants testified at the hearing that they could type. However, the evidence, to be discussed in detail _infra_, showed that they had failed to include that information on their qualifications updates, provided to the agency in November, 1981. I find the agency's failure to consider them qualified for this position in these circumstances was not error. _See_ _Lozada v. Education_, MSPB Docket No.

NY03518210388 (August 25, 1983). Nevertheless, and more importantly, even if they are considered qualified for the position, neither has a retention standing superior to Beets. Therefore, I find that neither Brooks nor Verver was, in any event, deprived of a right to which he was otherwise entitled to be retained in the GS-7 secretary position.

Brooks additionally claimed entitlement to the position of Grants Assistant (Typing), GS-7, held by L.O. Acosta. The agency admitted at the hearing that its award of that position to Acosta had been an error; that Acosta's relative standing among other former CSA employees did not warrant her entitlement to that GS-7 position. It asserted that the CSA employee entitled to be retained in that position was actually A. Ponce, in subgroup IA with a service computation date of 8-17-67.

Brooks does not have a retention right superior to Ponce, since they are both in the same subgroup, IA. See Harris; Baker; Klegman. Furthermore, even if the regulations required that service computation date be used to establish priorities within subgroups, Ponce's service computation date is earlier than Brooks' date. The agency again asserted that Brooks was not considered qualified for this position, in any event. Nevertheless, even if he is qualified, I find that he was not entitled to be retained in this position because he did not have greater retention standing than Ponce.[5] Accordingly, Brooks was not deprived of the right to be retained in OCS in the Grants Assistant (Typing), GS-7, position.

Both appellants also identified the position of Grants Assistant(Typing), GS-6, in the Division of Grants Management

(Transition), as one in which they should have been retained. This position was initially filled by temporary appointment of D. Bentley on February 7, 1982. The agency admitted at the hearing that in light of the Board's and the court's decisions regarding transferred functions that all "transition" positions should have been considered as having transferred from CSA on October 1, 1981; therefore, Bentley's temporary appointment was improper. The agency asserted that had it properly considered the position as in a transferred function, it would have awarded the position to former CSA employee Acosta. Both Bentley and Acosta are in tenure subgroup IB. The agency contended that a IB employee was entitled to this position because none of the former CSA employees in subgroup IA, including appellants, were qualified. However, because appellants are in a

higher subgroup, they have a retention standing superior to either Acosta or Bentley for competing assignment rights to any position for which they are considered qualified, at or below their former grade level. See Klegman; 5 C.F.R. § 351.703.

The agency asserted that each appellant was disqualified for this position based on his lack of typing skills. The unrefuted evidence established that this position, as a clerical-series position with a suffix designation of "(Typing)," had a qualifications requirement under the Office of Personnel Management Qualifications Standard (X-118 standard) for a typing skill of a minimum forty words-per-minute proficiency. Davis testified that because there were so few OCS positions to accomplish much of the same work previously done by many more CSA employees, that only employees fully

qualified and capable of beginning work at a full performance level were considered as eligible candidates for any of the OCS positions; therefore, no waivers of qualifications were considered.[6/] She said that since there were many former CSA employees being considered for this clerical position, any employee whose SF-171, or other records if a 171 was not available, reflected that he or she did not possess a forty words-per-minute typing skill that employee was determined to be ineligible for this position regardless of other qualification factors.

Davis testified that the agency had solicited current qualification information from appellants in 1981, see note 4, p. 5 supra, and that these two appellants were found disqualified based on their respective responses. Hearing Transcript pp. 175-176, 194-195, and 336. She said that both Brooks and Verver

returned a 171 which contained no reference to a typing skill, much less showed the required proficiency level.

Brooks testified that he could type and that his 171 and resume reflected that skill. Hering Transcript p. 186. He averred that his military duties had required typing and that he 171 and resume would indicate that military experience. At the hearing, Brooks reviewed the SF-171 and resume introduced by the agency as having been submitted by him for use in making qualifications determinations for OCS positions Hearing Exhibit 18. He confirmed that those documents did not mention typing experience specifically nor typing skills, neither on the resume nor the specific block (17) of the 171 which asked for designation of "special qualifications and skills [such as]. . . typing or shorthand speed." He denied having sent that 171 and resume, or any

other 171, to HHS in November, 1981, and testified that he had never received any request for an update of qualifications information regarding OCS positions. Hearing Transcript pp. 187-188, 192-193. He explained the absence of typing skills on the 171 produced by the agency, by saying it was an old application he had previously prepared for a specific job where typing skills were not important. Hearing Transcript p. 192.

In addition to Davis' testimony regarding the origin on the 171 and resume that the agency relied on in finding Brooks not qualified, the document itself contradicts Brooks' testimony. Hearing Exhibit 18 consists of two separate 171-s with resumes attached. They are essentially identical. One was received by the HHS personnel office on November 9, 1981, _see_ p. 21 of Exhibit 18, and the other received by that office on November

13, 1981, <u>see</u> p. 1 of Exhibit 18. Although both 171's were originally prepared and signed by Brooks in 1971, there are several amendments updating his qualifications, the latest dated October 30, 1981. Hearing Exhibit 18, p. 21. Most significantly, however, with the 171 received on November 13, was a handwritten, signed letter by Brooks, dated November 10, 1981, stating that in accordance with the November letter he was forwarding a resume, a SF-171, and a SF-50, and indicating that the lowest graded position he would accept was "open."[7/] Hearing Exhibit 18 p. 15.

I find the preponderance of the credible evidence supports a conclusion that Brooks did respond to the agency's request to provide updated qualifications information. A review of the response he provided reveals an absence of any reference to a typing skill or to any

specific typing experience. See Hearing Exhibit 18. I find that the agency properly relied on the information provided by appellant in November, 1981, as reflecting his current qualifications in its determination of which OCS positions appellant was qualified for and, therefore, may have had an assignment right, at a time as near as practicable to the actual transfer of function date. CS. McMahon v. Army, 21 M.S.P.R. 159 (1984) (qualifications determinations for assignment rights are to be made as of the date of release for competitive level. Since the 171 and resume provided by appellant did not put the agency on notice that he had typing skills, the agency correctly determined that he was not qualified for this typing position. See Lozada.

Verver also provided a current SF-171 to the agency in response to its November,

1981, request for an update of qualifications. That 171 showed no typing skills; the appropriate block on that form asking for typing speed was blank. See Hearing Transcript p. 366. Verver testified at the hearing that he could type and believed that he could have gained the necessary typing proficiency for the job within a sixty-day period. He did not deny nor otherwise refute the basis and information on which the agency had based its 1981 qualifications determination. I find that the determination made by the agency in 1981, based on the available information provided by Verver at the time, correctly rated him ineligible for a position requiring typing skills. See Lozada.

Because neither appellant has established that he was qualified for the position, based on information provided to the agency at the approximate time for the

CSA RIF, I find that neither had an assignment right to this CS-6 position. See 21 M.S.P.R. 379, 393-394. Accordingly, neither was denied a right of retention to which he was otherwise entitled by the agency's failure to offer him that position.

The Board's remand instructions are clear that only if the agency is unwilling or unable to refute an employee's showing, or bona fide claim, of right to be retained, or it fails to show that the employee would not in any event have been retained, is the appellant to prevail in the appeal. 21 M.S.P.R. 379, 394. Here, the evidence shows that these appellants were not denied a right under the RIF regulations to be retained in any of the specific positions claimed. I find that the appellants were not denied a right to be retained that they would have otherwise had in a proper transfer for function and

RIF. Accordingly, the CSA RIF actions separating Brooks and Verver are AFFIRMED.

Appeal Rights

This is an initial decision of the Merit Systems Protection Board. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by Filing a petition for review with:

Office of the Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. §§ 1201.114-115. The petition for review must be filed on or before November 12, 1985, and must set forth objections to the initial decision, supported by references to applicable lows, regulations and the record.

Copies of the petition for review, response, and all other motions and pleadings in connection therewith must be

served by the party submitting the pleading upon all parties to the proceeding and their designated representatives. 50 Fed. Ref. 28,895, 28,898 (1985) (to be codified at 5 C.F.R. § 1201.114[h]).

This initial decision will become a final decision of the Board on November 12, 1985, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§ 1201.113, .117.

Any appellant adversely affected or aggrieved by a final decision of the Board may, if the court has jurisdiction, obtain <u>judicial</u> review of that decision by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition may not be filed as long as the case is pending before the

Board. To be timely, the petition must be received by the Court within thirty (30) days of the final Board decision. 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

WILLIAM W. CARNES
Presiding Official

NOTES

1/ Because the RIF occurred in 1981, the RIF regulations they in effect control and are utilized in this adjudication. All citations in this decision to 5 C.F.R. Part 351 are to the 1981 edition of the Code. For convenience, citations to the Board's regulations, 5 C.F.R. Part 1201, are to the 1985 edition.

2/ Appellants were restricted at the hearing to identifying positions in the corresponding Dallas competitive area within OCS. Hearing Transcript pp. 57-127; see Hearing Exhibits 16 and 17; 5 C.F.R. Part 351; cf. Smith v. Commerce, 19 M.S.P.R. 580 (1984) (employees compete for positions only in the competitive area to which their function transferred). These appellants did not challenge that ruling by introducing evidence or argument to show their function had actually transferred to some other competitive area rather than Dallas. See Hearing Transcript pp. 104-110, 122.

3/ Beets was initially separated from CSA by RIF, along with all other former CSA employees. Shortly afterwards, pursuant to a federal district court order, HHS attempted to determine which CSA employees were entitled to be retained due to a transfer of functions from CSA. Once the former employees were identified and accepted an offer of employment, HHS cancelled the RIF separation and in its place retroactively reinstated the employees through a transfer to OCS. Through this procedure, Beets was awarded the position.

4/ On November 4, 1981, the OCS personnel officer mailed letters to all former CSA employees advising them that due to a federal district court order, HHS was filling positions which it had determined transferred from CSA with former CSA employees. It stated that in order to fill the

positions, it must "evaluate the qualifications of employees." A blank SF-171 was included, and each former CSA employee was requested to return a "completed SF-171" See Hearing Exhibit 6.

5/ Not only was Ponce the individual the agency asserted was entitled to this position, but Ponce prevailed in his own appeal; the agency was ordered to retroactively transfer Ponce into this position. See Ponce v. HHS, Docket No. DA03518210395-REM (Initial decision issued October 2, 1985).

6/ The regulations generally require that OPM standards be applied to determining RIF assignment rights, but do allow for agency discretion to waive those standards in certain circumstances. 5 C.F.R. §§ 351.701(a), .702. However, OPM has clarified that the exception to qualifications is only at the discretion of the agency involved. It has stated that whenever qualifications for a position are at issue in appeals before the Board, in determining an employees assignment rights, waiver should not be considered; OPM's qualification standards should be utilized. Federal Personnel Manual, Chapter 351, § 4-7(b) (1981).

7/ The agency's November letter requesting former CSA employees to update their qualifications (see note 4 on p. 5 supra) specifically asked for a SF-171 and the employees latest SF-50. See Hearing Exhibit 6. The SF-50 forwarded by Brooks was for his CSA RIF separation on September 30, 1981. See Hearing Exhibit 18, p. 14.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DALLAS REGIONAL OFFICE

	§	
	§	Docket Nos.
Leland I. Ammons,	§	DA03518210044-REM
Rex L. Carey,	§	DA03518210054-REM
Minnie L. David,	§	DA03518210076-REM
Appellants,	§	
v.	§	Date:
Department of Health and Human Services	§	October 8, 1985
Agency.	§	
	§	

Before

William W. Carnes, Presiding Official

DECISION

These three appellants filed appeals with the Board from the reduction-in-force (RIF) actions which separated them from employment with the former Community Services Administration (CSA, concurrently with that agency's abolishment, effective September 30, 1981. Each appeal falls within the Board's appellate jurisdiction

and is deemed to be timely filed. 5 C.F.R. §§ 351.901, 1201.22.[1] Based on previous Board holdings in these cases and the findings in this decision, the appealed actions are affirmed.

The Board has previously decided these appeals, in part, in a consolidated decision which remanded the cases to the regional office a limited purpose. Certain Former CSA Employees v. HHS, 21 M.S.P.R. 379 (1984), aff'd, 762 F.2d 978 (Fed. Cir. 1985). This decision is issued pursuant to those remand instructions. Essentially, it was decided that many, if not most, of the former CSA employees would have been separated with the abolishment of that agency, notwithstanding improprieties in the way those actions were accomplished. The Board held, therefore, that the appealed actions would be sustained unless the appellants were deprived of a substantive right to be

retained in the Office of Community SErvices (OCS), Department of Health and Human Services (HHS), that they would have had in a properly conducted transfer of function and RIF. Id. The only remaining issue to be resolved on remand was whether any individual appellant had been "denied retention to which he [or she] was otherwise entitled." 21 M.S.P.R. 379, 393-394.

Analysis and Findings

Ammons, Carey and David were afforded a hearing and the opportunity to come forward with claims and evidence to show that they would have been retained if a proper transfer of function and RIF had been conducted. At the hearing, all three appellants identified the position of Grants Assistant (Typing), GS-7, in the "close-out" division of the Dallas office of OCS, as a position to which they would

have been entitled. That position had initially been filled by L.O. Acosta. However, the agency admitted at the hearing that its award of that position to Acosta had been an error; that Acosta's relative standing among other former CSA employees did not warrant her placement in that GS-7 position. It asserted that the CSA employee entitled to be retained in that position was actually A. Ponce, in subgroup IA with a service computation date of 8-17-67. Ammons was in subgroup IA with a service computation date of 9-24-66; Carey was in subgroup IA with a service computation date of 8-18-62; and, David was in subgroup IA with a service computation date of 6-1-66.[2/]

Even though agencies are not required to fill vacancies in a RIF, once a determination has been made that vacancies be filled by employees affected by the RIF, as here, the RIF regulations must be

followed in a consistent manner. *See* *Wilburn v. Transportation*, 757 F.2d 260 (Fed. Cir. 1985); *Klegman v. HHS*, 16 M.S.P.R. 454 (1983); 5 C.F.R. §§ 351.201(b),.704(a). An agency must use subgroup classification to determine retention priorities for assignment to vacancies filled during a RIF. *Klegman* at 457. An employee's length of service, or earlier service computation date, does not establish a superior entitlement over a fellow employee in the same tenure subgroup for assignment to a vacant position, pursuant to the same RIF. *See* *Harris v. United States*, 153 Ct. Cl. 425 (1961); *Baker v. Commerce*, 19 M.S.P.R. $32 (1984).

None of these appellants have a retention standing greater than Ponce, since they are all the same subgroup, IA. *See* *Baker*; *Klegman*. The agency asserted that, in any event, appellants were not

considered as qualified for this clerical-typing position, based on a lack of, or insufficient, typing skills. Even though there was some indication at the hearing that each of the appellants could type to some extent, that information was not made available to the agency during the time of the RIF. The evidence regarding each appellant's typing ability and what each appellant advised the agency about that skill will be discussed in detail infra. I find that the agency's failure to consider these appellants qualified for this position was not an error under the circumstances. See Lozada v. Education, MSPB Docket No. NH03518210388 (August 25, 1983). The most significant fact, however, is that none of them were in a higher subgroup than Ponce. Therefore, even if I assume that they were qualified for the position, none has the retention standing superior to Ponce

necessary to show that they were entitled to be retained in this GS-7 position.[3] See Baker.

Carey and David claimed they were deprived of the right to be retained in the position of Secretary (Stenography), GS-7. Both claimed superior subgroup standing over incumbent L. Myers, who was in tenure subgroup IB. Carey also based his claim on having previously held a higher-graded position than Myers at CSA.

Myers was not hired until February 7, 1982. She filled a vacancy left by Olga Beets, the former CSA employee who had been retroactively awarded the GS-7 secretary position as of October 1, 1981, as a part of the CSA transfer of function.[4] The Dallas office of OCS had only one Secretary (Steno), GS-7, position. The incumbent of that position following the transfer of function was Beets, not Myers. Thus, in order to

establish an entitlement to be retained in that position at the time of the RIF, regardless of whether claiming retention entitlement over Myers or Beets, appellants must have a retention standing superior to Beets.

Beets was in tenure subgroup IA, with a service computation date of 1-1-61. Since Carey and David are also in tenure subgroup IA, neither has a subgroup standing superior to Beets. See, e.g., Baker. Moreover, even if the regulations required that service computation dates be used as the criteria for establishing priorities within subgroups, neither appellant has an earlier service computation date than Beets. There is no provision in the RIF regulations that makes any distinction for previously held grade levels between employees competing for assignment rights to a position at or below their previous representative rate,

outside their original competitive level, and for which they are otherwise qualified. See 5 C.F.R. Part 351. Notwithstanding the possible issue of whether they were qualified for this secretary/clerical position, I find that the evidence shows they were not deprived of a right to which they were otherwise entitled due to their relative retention standing with Beets.

Additionally, Carey identified the position of Field Representative, GS-13, in the Division of Grants Management (Transition), as one in which he should have been retained. He alleged that he had an earlier service computation date than S. Doss, the former CSA employee awarded this position. Doss, in tenure subgroup IA, was temporarily appointed to the position on February 7, 1982. However, the agency conceded at the hearing that, based on the Board's and

court's decisions, all "transition" positions were part of a transferred function from CSA and, therefore, Doss' temporary appointment had been improper. See Former CSA Employees. The agency contended that had this position initially been considered as part of a transferred function, F.M. Hold would have been awarded the position.[5/] Holt was in subgroup IA with a service computation date of 6-30-60.

Carey does not have retention rights greater than Holt, or greater than Jewert, Riemer, or Doss, since they are in the same tenure subgroup. See Baker; Klegman. Even if the regulations required that service computation dates be used as the criteria for establishing priorities within subgroups, Holt has an earlier service computation date than Carey. Accordingly, I find that Carey would not have been retained in the GS-13 position,

even in a proper transfer of function from CSA.

Ammons, Carey, and David each identified and claimed entitlement to the position of Grants Assistant (Typing), GS-6, filled by a temporary appointment of former CSA employee D. Bentley on February 7, 1982. This position was another of those "transition" positions which the agency admitted should have been considered as having transferred from CSA; and, therefore, Bentley's temporary appointment was improper. The agency contended that had it properly considered the position as part of a transferred function, it would have awarded the position to L.O. Acosta. Both Bentley and Acosta are in tenure subgroup IB. Because appellants are in a higher subgroup, they have retention rights greater than either Acosta or Bentley when competing for assignment under the RIF regulations for

any position for which they are considered qualified, at or below their former grade levels. <u>See</u> <u>Klegman</u>; 5 C.F.R. § 351.703.

The agency contended that a IB employee was entitled to this position because none of the former CSA employees in subgroup IA, including appellants, were qualified. These three appellants were rated as not qualified based on their lack of sufficient typing skills. The unrefuted evidence established that this position, as a clerical-series position with a suffix designation of "(Typing)," had an Office of Personnel Management Qualifications Standard (X-118 standard) requiring a typing skill of a minimum forty words-per-minute proficiency. M.J. Davis, HHS Supervisory Personnel Management Specialist, testified that because there were so few OCS positions to accomplish much of the same work previously done by many more CSA

employees, that only employees fully qualified and capable of beginning work at a full performance level were considered as eligible candidates for any of the OCS positions. She testified that waivers of qualifications were not considered.[6] Hearing Transcript p. 494. She said that since there were many former CSA employees being considered for this clerical position, any employee whose SF-171 (Personal Qualifications Statement), or other records if a 171 was not available, reflected that he or she did not possess a forty words-per-minute typing skill was determined to be ineligible for this position, regardless of other qualification factors.

Davis testified that the agency had solicited former CSA employees to provide current qualification information in order that eligibility determinations for OCS positions could be made.[7] She said that

current SF-171's were received from Ammons and David which showed that they did not have the necessary typing skills. Hearing Transcript pp. 482, 581. Ammons' SF-171 showed only thirty words-per-minute typing ability, and David's 171 was blank in the block for typing skill. Davis said that no current 171 for Carey was available in the agency personnel office in Washington where the retention rights and assignment rights were being determined, and that he did not respond to their request for an updated 171. Consequently, she explained, the Dallas Regional HHS Personnel Office was asked to check Carey's records to determine if he was eligible for the position here involved. She said that she assumed his SF-171 on file in that office for the re-employment priority list was used to make the determination. The response received from the Dallas region was that Carey was not qualified based on

his lack of typing skill. Hearing Transcript p. 329. Davis testified that subsequently she personally reviewed CArey's 171 and confirmed that it indeed reflected that he did not have the requisite typing skill.

Ammons testified that he had taken typing in high school, and believed his typing skills were, or given a short brush-up period could have been, at or above a forty word-per-minute level. Although he had years before designated forty words-per-minute typing skill on a 171 (Hearing Exhibit F, SF-171 from October, 1973), he confirmed that he had entered thirty words-per-minute as his typing speed on the 171 dated November 12, 1981, (Hearing Exhibit 21) that was used by the agency in making its qualifications determination. Hearing Transcript pp. 503-504. Ammons could not recall whether he had sent this 171 in response to the

November, 1981, request for a current 171, but thought this may have been the 171 that he had prepared for the "outplacement officer" who was attempting to find jobs for former CSA employees in the Dallas region. In any event, he admitted that he had prepared this 171 (Exhibit 21) for the purpose of obtaining employment in any job subsequent to his CSA separation. Hearing Transcript pp. 504-505.

I find that the agency properly relied on the most current information, in relation to the transfer of function date, prepared by appellant in November, 1981, for the purpose of determining his qualifications for OCS positions. Cf. McMahon v. Army, 21 M.S.P.R. 159 (1984) (qualification determinations for assignment rights are to be made as of the date of release from competitive level). Since that SF-171 notified the agency that Ammons' typing skill level was only thirty

words-per-minute, which was less than the required minimum of forty words-per-minute, the agency correctly determined that he was not qualified for assignment to this typing position. <u>See</u> <u>Lozada</u>.

Carey also testified that he could type and that he believed he could have met the forty words-per-minute skill level. However, he admitted that although he had received the November, 1981, request for an updated SF-171, he did not submit any response because he believed his records were accurate and complete. Hearing Transcript p. 338. He further confirmed that he was aware that his SF-171 of record at the time did not include any information showing that he could type, and he admitted there was probably no other indication in his files showing he had a typing ability. Hearing Transcript p. 339.

The agency's letter requesting an updated 171 also advised employees that failure to submit an updated form would result in the use of "records currently available" to make determinations of qualifications of the employee for positions in OCS. Hearing Exhibit 6. Even though Carey knew his qualifications on record did not show he could type, he did not avail himself of the opportunity to notify the agency of any additional skills. They, I find that the agency correctly determined that Carey was not qualified for assignment to this position in November, 1981. See Lozada.

David offered no evidence that she could in fact type nor did she attempt to refute Davis' credible testimony that her then current SF-171 showed no indication of a typing skill on that part of the form asking for that specific information. She alluded to the fact that she had

previously held a position as a Travel Voucher Clerk, but adduced no specific evidence pertaining to typing skills necessary for that job, nor to having specifically notified the agency otherwise of any typing skills. I find that, based on the information it had available, the agency was not in error when it determined that David was not qualified for this position due to a lack of the requisite typing skill. See Lozada.

I find that none of these appellants had informed the agency that he or she possessed a typing skill that met the minimum proficiency level required for this clerical-typing position. Accordingly, they have no basis to now claim entitlement to that position for which the agency, at the time, correctly rated them not qualified. ID. I find that the agency's failure to offer any of these appellants the position of the

Grants Assistant (typing), GS-6, did not deprive them of a right of retention to which they may have otherwise been entitled.[8]

Appellants argued that it permitted to assert a right of retention to positions in OCS headquarters in Washington, D.C., they would be able to show entitlement to one of those positions. The positions discussed above are the only OCS positions in the Dallas area for which these appellants claimed any retention entitlement.

Because of the limitation by the RIF regulations of retention rights and assignment of rights to a competitive area, I ruled at the hearing that any claim of a right of retention to an OCS position was restricted to positions in the appropriate competitive area in OCS.[9] Hearing Transcript pp. 57-127, Hearing Exhibits 16 and 17; <u>see</u> <u>Smith v. Commerce</u>,

19 M.S.P.R. 589 (1984); 5 C.F.R. §§ 351.301-.404, .601-.603, .703. For these appellants, the appropriate competitive area was initially determined to be the Dallas region of OCS. Nevertheless, appellants were allowed the opportunity at the hearing to challenge that limitation by introducing evidence and argument that they were identified with a function that had transferred to some other competitive area. If such a showing was made, that employee's retention rights, if any, would be in that competitive area. See Hearing Transcript pp. 104-110, 122. only Carey attempted to establish that his CSA function had actually transferred to some other OCS competitive area.

Carey was a former Program Analyst, GS-345-13. He claimed that his function had transferred to the Washington, D.C., competitive area. The main function of the regional program analyst positions, at

least three which were in the CSA Dallas region, was generally described as conducting studies and evaluations of community action programs and low income programs in general, and programs funded by CSA in particular. The incumbents of these positions worked with the CSA Regional Council and other agencies in conducting inter-agency evaluations. They worked closely with management on overall planning, development, and interpretation of their various studies and evaluations. Their work ranged from specific grants to regional studies involving statewide programs and reached across state lines within the region. CArey argued that since there were no program analyst (series 345) positions in the OCS regional office, but there were such positions in OCS headquarters, that the CSA regional function had transferred to Washington.

The agency contended that the program analysts in OCS headquarters only continued to perform functions related to evaluation and studies which were national in scope, and that OCS headquarters did not perform the regional evaluations previously done in CSA regions. It argued that with the closing down of CSA, the broad-scope regional evaluations performed by the regional program analysts were no longer needed or performed. The agency admitted there were some limited continuing functions in the region related to evaluations of grants administered by OCS, but contended that the Field Representative positions in the OCS region performed those duties.

The functions that the Board determined transferred from CSA, the significantly smaller workforce of OCS compared to CSA, and the evidence presented at the hearing on this issue,

all support a conclusion that not all functions and jobs previously performed at the CSA regional office transferred to OCS and continued, either at the corresponding regional level or at the headquarters level. See 21 M.S.P.R. 379. Most of the major functions performed by CSA were eliminated; others transferred only in part and, therefore, were dispersed among the few available OCS positions to be performed along with the other duties of those positions. See 21 M.S.P.R. 379,389.

Upon consideration of the evidence and argument on this issue, and in light of the Board's findings in Former CSA Employees, I was not persuaded that the regional CSA program analyst function transferred to the headquarters level. See Hearing Transcript pp. 277-325. I ruled at the hearing that the proper competitive area in which Carey would have competed for retention following a

transfer of function was the Dallas region of OCS. See Neilson v. Federal Highway Administration, 21 M.S.P.R. 178 (1984); Smith. Accordingly, Carey's contention that he was denied retention in OCS headquarters was not considered a legitimate claim of retention entitlement.

The Board's remand instructions are clear that only if the agency is unwilling or unable to refute an employee's showing, or bona fide claim, of a right to be retained, or it fails to show that the employee would not in any event have been retained, is the appellant to prevail in the appeal. 21 M.S.P.R. 379, 394. Here, the evidence shows that none of these appellants were denied a right under the RIF regulations to be retained in any of the specific positions claimed, or in any positions in the Washington competitive area. I find that the appellants were not denied a right to be retained that they

would have otherwise had in a proper transfer of function and RIF. Accordingly, each of the CSA RIF actions affecting these appellants is AFFIRMED.

Appeal Rights

This is an initial decision of the Merit Systems Protection Board. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing a petition for review with:

Office of the Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. §§ 1201.114-115. The petition for review must be filed on or before November 12, 1985, and must set forth objections to the initial decision, supported by references to applicable laws, regulations and the record.

Copies of the petition for review, response, and all other motions and pleadings in connection therewith must be served by the party submitting the pleading upon all parties to the proceeding and their designated representatives. 50 Fed. Ref. 28,895, 28,898 (1985) (to be codified at 5 C.F.R. § 1201.114[h]).

This initial decision will become a final decision of the Board on November 12, 1985, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§ 1201.113, .117.

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The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition may not be filed as long as the case is pending before the Board. To be timely, the petition must be _received_ by the Court within thirty (30) days of the final Board decision. 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

WILLIAM W. CARNES
Presiding Official

NOTES

1/ Because the RIF occurred in 1981, the RIF regulations they in effect control and are utilized in this adjudication. All citations in this decision to 5 C.F.R. Part 351 are to the 1981 edition of the Code. For convenience, citations to the Board's regulations, 5 C.F.R. Part 1201, are to the 1985 edition.

2/ David had initially competed against other former CSA employees as having been in tenure subgroup IB. See Hearing Exhibit 2. However, at the hearing, the parties stipulated that she was entitled to veterans preference and, therefore, should properly be in tenure subgroup IA. Hearing Transcript pp. 578-579.

3/ Not only was Ponce the individual the agency asserted was entitled to this position, but Ponce prevailed in his own appeal; the agency was ordered to retroactively transfer Ponce into this position. See Ponce v. HHS, Docket No. DA03518210395-REM (Initial decision issued October 2, 1985).

4/ Beets was initially separated from CSA by RIF, along with all other former CSA employees. Shortly afterwards, pursuant to a federal district court order, HHS attempted to determine which CSA employees were entitled to be retained due to a transfer of functions from CSA. Once the former employees were identified and accepted an offer of employment, HHS cancelled the RIF separation and in its place retroactively reinstated the employees through a transfer to OCS. Through this procedure, Beets was awarded the position.

5/ Actually, there were two Field Representative, GS-13, positions in the "transition" division. Carey claimed entitlement only over the position held by Doss; which the agency asserts would have been awarded to Holt. The other GS-13 position, temporarily filled by R. Jewert, (IA, 12-22-61), would have been awarded to

another CSA employee, N. Riemer, (IA, 4-6-61), according to the agency's testimony. EVen if Carey had claimed retention entitlement to this other GS-13 position, the same analysis and findings regarding Holt would also be applicable to Riemer's position. Holt and Riemer prevailed in their own appeals and the agency was order to retroactively transfer them into these positions. See Holt and Riemer v. HHS, Docket Nos. DA03518210419-REM, DA03518210055-REM (initial decisions issued September 27, 1985).

6/ The regulations generally require that OPM standards be applied to determining RIF assignment rights, but do allow for agency discretion to waive those standards in certain circumstances. 5 C.F.R. §§ 351.701(a), .702. However, OPM has clarified that the exception to qualifications is only at the discretion of the agency involved. It has stated that whenever qualifications for a position are at issue in appeals before the Board, in determining an employees assignment rights, waiver should not be considered; OPM's qualification standards should be utilized. Federal Personnel Manual, Chapter 351, § 4-7(b) (1981).

7/ On November 4, 1981, the OCS personnel officer mailed letters to all former CSA employees advising them that due to a federal district court order, HHS was filling positions which it had determined transferred from CSA with former CSA employees. It stated that in order to fill the positions, it must "evaluate the qualifications of employees." A blank SF-171 was included, and each former CSA employee was requested to return a "completed SF-171" See Hearing Exhibit 6.

8/ Notwithstanding the agency's consistent assertion that Acosta, rather than Bentley, was entitled to this position, I determined in a separate appeal that another former CSA employee, Frank S. Gallardo (IA, 4-4-64), was entitled to

have been retained in this OCS position. See Gallardo v. HHS, MSPB Docket No. DA03518210137-REM (Initial decision issued October 8, 1985).

9/ Shortly after its inception, OCS established each regional office as a separate competitive area and the Washington metropolitan area as a separate competitive area. Hearing Exhibit 17.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

	§	Docket Nos.
Sharon L. Bennett,	§	DA03518210416
Carolyn J. Empy,	§	DA03518210073-REM
William J. Fergeson,	§	DA03518210048-REM
Carl R. Gross,	§	DA03518210080-REM
Love B. Johnson,	§	DA03518210063-REM
Maudean D. Little,	§	DA03518210086-REM
Betty J. Reece,	§	DA03518210365-REM
Appellants,	§	
	§	Date
v.	§	September 20, 1985
	§	
Department of Health	§	
and Human Services	§	
Agency.	§	
	§	

Before

William W. Carnes, Presiding Official

DECISION

These seven appellants filed appeals with the Board from the reduction-in-force (RIF) actions which separated them from employment with the former Community Services Administration (CSA), concurrently with that agency's abolishment,

effective September 30, 1981.[1] Each appeal falls within the Board's appellate jurisdiction and is deemed to be timely filed. 5 C.F.R. §§ 351.901, 1201.22;[2] see Gonzalez at 607. Based on previous Board holdings in these cases and the findings in this decision, the appealed actions are affirmed.

The Board has previously decided these appeals, in part, in a consolidated decision which remanded the cases to the regional office for a limited purpose.[3] Certain Former CSA Employees v. HHS, 21 M.S.P.R. 379 (1984), aff'd., 762 F.2d 978 (Fed. Cir. 1985). This decision is issued pursuant to those remand instructions. Essentially, it was decided that many, if not most, of the former CSA employees would have been separated with the abolishment of that agency, notwithstanding improprieties in the way those actions were accomplished. The

Board held, therefore, that the appealed actions would be sustained unless the appellants were deprived of a substantive right to be retained in the Office of Community Services (OCS), Department of Health and Human Services (HHS), that they would have had in a properly conducted transfer of function and RIF. Id. The only remaining issue to be resolved on remand was whether any individual appellant had been "denied retention to which he [or she] was otherwise entitled." 21 M.S.P.R. 379, 393-394.

Analysis and Findings

Appellants were afforded a hearing and the opportunity to come forward with claims and evidence to show that they would have been retained if a proper transfer of function and RIF had been conducted. At their hearings, all appellants alleged that they had retention

rights to the position of Grants Assistant (Typing), GS-303-6, in the Dallas OCS Division of Grants Management (Transition). No other positions in OCS were claimed.[4] That Grants Assistant position was actually filled by former CSA employee D. Bentley by a temporary appointment on February 7, 1982. The agency conceded at the hearing, that based on the Board's and court's decisions, all "transition" positions were part of a transferred function from CSA and, therefore, Bentley's temporary appointment had been improper. The agency contended that had the position initially been considered as in one of the transferred functions, former CSA employee L.O. Acosta would have been awarded that position. Both Bentley and Acosta are in tenure subgroup IB. Agency Hearing Exhibit 2. All seven appellants, career employees

without veterans preference, are in tenure subgroup IB. See id; 5 C.F.R. § 351.501.

Agencies are not required to fill vacancies in a RIF. 5 C.F.R. § 351.201(b). However, once a determination has been made to fill vacancies, as here, an agency must follow the RIF regulations in a consistent manner. See Wilburn v. Transportation, 757 F.2d 260 (Fed. Cir. 1985); Klegman v. HHS, 16 M.S.P.R. 454 (1983); 5 C.F.R. §§ 351.201(b), .704(a). An agency must use subgroup classification to determine retention priorities for assignment to vacancies filled during a RIF. Klegman at 457. An employees length of service, or earlier service computation date, does not establish a superior entitlement over a fellow employee in the same tenure subgroup for assignment to a vacant position, pursuant to the same RIF. See Harris v. United States, 153 Ct. Cl. 425 (1961); Klegman at 457.

The appellants do not have retention rights greater than either Bentley or Acosta, since they are all in the same tenure subgroup. Moreover, even if the regulations did require that service computation date be used as the criteria for establishing priorities within subgroups, none of these appellants has an earlier service computation date than Acosta (1947).

I find that the appellants do not have superior retention entitlement over the incumbent. Moreover, if Bentley had not received the position on a temporary basis, it would have been awarded to Acosta. I find that none of the appellants have retention entitlement superior to Acosta. Therefore, the evidence supports a conclusion that these appellants were not denied retention to a continuing position in OCS, to which they

were otherwise entitled, by the 1981 RIF. Each of these CSA separations is AFFIRMED.

Appeal Rights

This is an initial decision of the Merit Systems Protection Board. Any party or the Office Of Personnel Management may seek to have it reviewed by the Board by filing an original and two copies of a petition for review with:

Office of the Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. §§ 1201.114-.115. The petition for review must be filed on or before October 25, 1985, and must set forth objections to the initial decision, supported by references to applicable laws, regulations and the record.

Copies of the petition for review, response, and all other motions and pleadings in connection therewith must be

served by the party submitting the pleading upon all parties to the proceeding and their designated representatives. 50 Fed. Reg. 28,895, 28,898 (1985) (to be codified at 5 C.F.R. § 1201.114[h]).

This initial decision will become a final decision of the Board on October 25, 1985, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§ 1201.113, .117.

Any appellant adversely affected or aggrieved by a final decision of the Board may, if the court has jurisdiction, obtain judicial review of that decision by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition may not be filed as long as the case is pending before the

Board. To be timely, the petition must be <u>received</u> by the court within thirty (30) days of the final Board decision. 5 U.S.C. § 7703(b)(1).

FOR THE BOARD

WILLIAM W. CARNES
Presiding Official

NOTES

[1] Bennett resigned on September 19, 1981. Gross retired effective September 30, 1981. Little was separated on September 30, 1981, by transfer to the Department of the Air Force. Their separations present essentially identical issues of voluntariness in similar factual situations as the case of Covington v. HHS, 750 F.2d 937 (Fed. Cir. 1984). I find that the court's holdings in Covington are applicable here. Accordingly, these three separations from CSA are treated as involuntary, and the Board has jurisdiction over the underlying RIF actions. Gonzalez v. Transportation, 19 M.S.P.R. 605 (1984). Therefore, these three appellants were afforded an opportunity to show they had been denied retention to which they were otherwise entitled, pursuant to the Board's decision in Certain Former CSA Employees V. HHS, 21 M.S.P.R. 379 (1984). See Covington at 944.

[2] Because the RIF occurred in 1981, the RIF regulations they in effect control and are utilized in this adjudication. All citations in this decision to 5 C.F.R. Part 351 are to the 1981 edition of the Code. For convenience, citations to the Board's regulations, 5 C.F.R. Part 1201, are to the 1985 edition.

[3] Bennett was not one of the parties in Former CSA Employees. Nevertheless, because Bennett's appeal is within the Board's jurisdiction (see note 1, Supra), her appeal is essentially identical to those in the consolidated cases. Accordingly, I find the rulings of the Board in Former CSA Employees are applicable to Bennett's appeal. She was, therefore, provided the same opportunity to show a violation of her substantive retention rights.

[4] Some of the appellants argued that if permitted, they could establish a superior retention right to positions in OCS headquarters in Washington, D.C. However, appellants were restricted at the hearing to identifying positions in the corresponding Dallas competitive area within OCS. Hearing Transcript pp. 57-127; *see* Hearing Exhibits 16 and 17; 5 C.F.R. Part 351; *cf.* *Smith v. Commerce*, 19 M.S.P.R. 580 (1984) (employees compete for positions only in the competitive area to which their function transferred). These appellants did not challenge that ruling by introducing evidence or argument to show their function had actually transferred to OCS headquarters rather than the corresponding regional office. *See* Hearing Transcript pp. 104-110, 122.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DALLAS REGIONAL OFFICE

	§	Docket Nos.
Doris S. Bentley,	§	DA03518210071-REM
O. Dean Bridges,	§	DA03518210382-REM
Carolyn Cauley-Leath,	§	DA03518210062-REM
Oscar J. Daville,	§	DA03518210077-REM
Judith A. Heath,	§	DA03518210068-REM
Appellants,	§	
	§	
v.	§	Date:
	§	September 20, 1985
Department of Health and Human Services	§	
Agency.	§	
	§	

Before

William W. Carnes, Presiding Official

DECISION

These five appellants filed appeals with the Board from the reduction-in-force (RIF) actions which separated them from employment with the former Community Services Administration (CSA), concurrently with that agency's abolishment, effective September 30, 1981. Each appeal

falls within the Board's appellate jurisdiction and is deemed to be timely filed. 5 C.F.R. §§ 351.901, 1201.22;[1] Based on previous Board holdings in these cases and the findings in this decision, the appealed actions are affirmed.

The Board has previously decided these appeals, in part, in a consolidated decision which remanded the cases to the regional office for a limited purpose. Certain Former CSA Employees v. HHS, 21 M.S.P.R. 379 (1984), aff'd., 762 F.2d 978 (Fed. Cir. 1985). This decision is issued pursuant to those remand instructions. Essentially, it was decided that many, if not most, of the former CSA employees would have been separated with the abolishment of that agency, notwithstanding improprieties in the way those actions were accomplished. The Board held, therefore, that the appealed actions would be sustained unless the appellants were

deprived of a substantive right to be retained in the Office of Community Services (OCS), Department of Health and Human Services (HHS), that they would have had in a properly conducted transfer of function and RIF. Id. The only remaining issue to be resolved on remand was whether any individual appellant had been "denied retention to which he [or she] was otherwise entitled." 21 M.S.P.R. 379, 393-394.

Analysis and Findings

Appellants were afforded a hearing and the opportunity to come forward with claims and evidence to show that they would have been retained if a proper transfer of function and RIF had been conducted.[2] At the hearing, all these appellants either could not or did not identify any positions in OCS to which they could legitimately claim any retention entitlement.

Heath, formerly a GS-5 Clerk Typist for CSA, claimed entitlement to a GS-6 position. Since there is not right to promotion or retention in a higher graded position during a RIF, her assertion had no basis of entitlement under RIF regulations. See South v. Air Force, 7 MSPB 579 (1981); 5 C.F.R. § 351.704(b)(1). Without a legitimate basis on which her claim could be supported, Heath's asserted entitlement to the higher-granded position is not considered a bona fide claim to a right of retention.

Bridges, a career conditional employee when separated from CAS, with veterans preference, was properly in tenure subgroup IIA. See 5 C.F.R. z 351.501. He asserted a right of retention to the position of Grants Assistant (Typing), GS-303-6, in the Dallas OCS Division of Grants Management (Transition). That position had been

filled as a temporary position by former CSA employee D. Bentley on February 7, 1982.

At the hearing, the agency conceded that Bentley's temporary appointment was improper in light of the Board's finding that the "transition" function transferred from CSA. The agency asserted that had it treated the position as a transferred function, the position would have been awarded to the former CSA employee L.O. Acosta. Both the actual incumbent, Bentley, and the person now identified by the agency as entitled to the position, Acosta, were in tenure subgroup IB. hearing Exhibit 2. Bridges' retention rights in subgroup IIA are clearly inferior to the retention rights of either of these former fellow employees. See Klegman v. HHS, 16 M.S.P.R. 454, 457 (1983); 5 C.F.R. § 351.703(a)(1). Because Bridges does not have the subgroup

superiority necessary to assert a bona fide claim of retention entitlement to the identified position, I find he does not meet the initial showing that he was denied retention in an OCS position.

Bentley, Cauley-Leath, and Daville contended that if permitted to assert a right of retention to positions in OCS headquarters in Washington, D.C., they would be entitled to one of those positions. None of the three claimed entitlement to an OCS position in the Dallas region.

In light of the limitation of retention rights and assignment rights to a competitive area by the RIF regulations, I ruled at the hearing that the opportunity to claim a right of retention to an OCS position was restricted to the appropriate competitive area in OCS.[3] Hearing Transcript pp. 57-127, Hearing Exhibits 16 and 17; <u>see</u> <u>Smith v. Commerce</u>,

19 M.S.P.R. 589 (1984); 5 C.F.R. § 351.301-.404, .601-.603, .703. For these three appellants, the appropriate competitive area was initially determined to be the Dallas region of OCS. Nevertheless, appellants were allowed the opportunity at the hearing to challenge that limitation by introducing evidence and argument that they were identified with a function that had transferred to some other competitive area. If such a showing was made, that employee's retention rights, if any, would be in that competitive area. See Hearing Transcript pp. 104-110, 122.

Bentley, a former Community Action Programs Assistant (typing), GS-6, in Dallas, made no assertion nor offer of proof that her function transferred to OCS headquarters rather than the Dallas competitive area. Since Bentley did not claim any Dallas position, I find that she

did not meet the initial showing that she was entitled to be retained by OCS.

Daville, a former Office Services Clerk, GS-5, attempted to establish that his CSA function had actually transferred to OCS headquarters competitive area rather than the corresponding Dallas competitive area. Daville described the functions performed in his position as dealing with property management, reproduction and storage of forms and documents, and general supply and administrative duties. There was no specific office services position in the smaller OCS Dallas office. The agency contended that any remnants of the former regional CSA office services functions were performed by various personnel with the OCS regional office and that the function had not transferred to Washington.

After considering all evidence and argument submitted on this issue, and in light of the nature of the job and the limited continuing functions that the Board determined transferred to OCS, I find that the office services function did not transfer to OCS headquarters. _See generally_, 21 M.S.P.R. 379. Accordingly, Daville's retention entitlement, if any, was in the Dallas competitive area. He claimed no positions in that competitive area.

Cauley-Leath, a former community Action Programs Specialist, GS-11, also alleged that her function had transferred to Washington. She contended that "training" had been her primary CSA duty and that there was no corresponding position in the OCS region. The agency argued that any training function within OCS that may have carried over from CSA was included in the local supervisory

functions and duties, with some overlapping of the responsibility for training grantees into the OCS positions of Field Representatives. In light of the nature of the function involved and the specific functions that the Board determined transferred from CSA, I find that the function of Cauley-Leath's regional CSA position did not transfer to OCS headquarters. Id. Accordingly, her entitlement to retention in OCS was limited to the Dallas competitive area. She claimed no OCS positions in Dallas.

The Board's remand instructions are clear that an appellant must first make the initial showing, or at least a bona fide claim, of the right of retention to some continuing position in OCS. Only if the agency is then unable or unwilling to refute that assertion or to show that the employee would not in any event have been retained is the appellant to prevail in

the appeal. See 21 M.S.P.R. 379, 394. I find that these appellants have failed to assert any bona fide claims of a right to be retained in any OCS positions. Accordingly, each of the CSA RIF actions affecting these appellants is AFFIRMED.

Appeal Rights

This is an initial decision of the Merit Systems Protection Board. Any party or the Office Of Personnel Management may seek to have it reviewed by the Board by filing an original and two copies of a petition for review with:

Office of the Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. §§ 1201.114-[illegible]. The petition for review must be [illegible] on or before October [illegible], [illegible], and must set [illegible] objections to the initial decision, supported by references to

applicable laws, regulations and the record.

Copies of the petition for review, response, and all other motions and pleadings in connection therewith must be served by the party submitting the pleading upon all parties to the proceeding and their designated representatives. 50 Fed. Reg. 28,895, 28,898 (1985) (to be codified at 5 C.F.R. § 1201.114[h]).

This initial decision will become a final decision of the Board on October 25, 1985, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§ 1201.113, .117.

Any appellant adversely affected or aggrieved by a final decision of the Board may, if the court has jurisdiction, obtain judicial review of that decision by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition may not be filed as long as the case is pending before the Board. To be timely, the petition must be received by the court within thirty (30) days of the final Board decision. 5 U.S.C. § 7703(b)(1).

FOR THE BOARD

WILLIAM W. CARNES
Presiding Official

NOTES

[1] Because the RIF occurred in 1981, the RIF regulations they in effect control and are utilized in this adjudication. All citations in this decision to 5 C.F.R. Part 351 are to the 1981 edition of the Code. For convenience, citations to the Board's regulations, 5 C.F.R. Part 1201, are to the 1985 edition.

[2] Bentley was hired on a temporary appointment to a GS-6 position in the Dallas office of OCS on February 7, 1982, not retroactively as a transfer but from a reemployment priority list. Since this action was not a substitute for her RIF separation, it had no bearing on her retention rights during the CSA RIF.

[3] Shortly after its inception, OCS established each regional office as a separate competitive area and the Washington metropolitan area as a separate competitive area. Hearing Exhibit 17.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROY E. BROOK, LELAND I. AMMONS, ET AL.,
Petitioners.

V. Appeal No. 86-858

DEPARTMENT OF HEALTH & HUMAN SERVICES,
Respondent.

JUDGMENT

ON APPEAL from the:
MERIT SYSTEMS PROTECTION BOARD

IN CASE no(s). DA03518210294 - REM, et al.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

DISMISSED FOR FAILURE TO PROSECUTE IN ACCORDANCE WITH THE RULES.

ENTERED BY ORDER OF THE COURT

/s/
FRANCIS X. GINDHART, CLERK

Dated June 13, 1986
Issued as Mandate July 24, 1986

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WILLIAM FERGESON, CARL R. GROSS, ET AL.,
Petitioners.

V. Appeal No. 86-902

DEPARTMENT OF HEALTH & HUMAN SERVICES,
Respondent.

JUDGMENT

ON APPEAL from the:
MERIT SYSTEMS PROTECTION BOARD

IN CASE no(s). DA03518210048 - REM, et al.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

DISMISSED FOR FAILURE TO PROSECUTE IN ACCORDANCE WITH THE RULES.

ENTERED BY ORDER OF THE COURT

/s/
FRANCIS X. GINDHART, CLERK

Dated June 13, 1986
Issued as Mandate July 21, 1986

Note: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WILLIAM J. FERGESON, ET AL.,	§	
Petitioners.	§	
	§	Appeal No.
V.	§	86-902
	§	
DEPARTMENT OF HEALTH &	§	ON MOTION
HUMAN SERVICES,	§	
Respondent.	§	

Before RICH, Circuit Judge.

ORDER

Upon consideration of petitioners' motions, IT IS ORDERED THAT:

(1) The motion for leave to file brief out of time is denied.

(2) The motion to vacate the order of dismissal is denied.

FOR THE COURT

July 9, 1986
Date

/s/
Giles S. Rich
Circuit Judge

Filed
Jul 9, 1986

cc: John M. Stokes, Esq.
Jonathan S. Baker, Esq.

Note: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROY B. BROOKS,	§	
LELAND I. AMMONS, ET AL.,	§	
Petitioners.	§	
	§	Appeal No.
V.	§	86-858
	§	
DEPARTMENT OF HEALTH &	§	ON MOTION
HUMAN SERVICES,	§	
Respondent.	§	

Before RICH, Circuit Judge.

ORDER

Upon consideration of petitioners' motion to vacate the order of dismissal,

IT IS ORDERED THAT:

The motion is denied.

FOR THE COURT

July 9, 1986
Date

/s/
Giles S. Rich
Circuit Judge

Filed
Jul 9, 1986

cc: John M. Stokes, Esq.
Jonathan S. Baker, Esq.

Note: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WILLIAM J. FERGESON, ET AL., §
Petitioners. §
§ Appeal No.
V. § 86-902
§
DEPARTMENT OF HEALTH & § ON MOTION
HUMAN SERVICES, §
Respondent. §

ORDER

Petitioners move:

(1) For reconsideration of the courts' July 9, 1986 order which denied petitioners motion to vacate the order of dismissal, and

(2) To vacate the mandate which issued July 21, 1986. In consideration thereof,

IT IS ORDERED THAT: the motions are denied.

FOR THE COURT

Sept 9, 1986
Date

/s/
FRANCES X. GINDHART
Clerk

Filed
SEP 10, 1986

Note: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROY B. BROOKS,	§	
LELAND I. AMMONS, ET AL.,	§	
Petitioners.	§	
	§	Appeal No.
V.	§	86-858
	§	
DEPARTMENT OF HEALTH &	§	ON MOTION
HUMAN SERVICES,	§	
Respondent.	§	

ORDER

Petitioners move:

(1) For reconsideration of the courts' July 9, 1986 order which denied petitioners motion to vacate the order of dismissal, and

(2) To vacate the mandate which issued July 24, 1986. In consideration thereof,

IT IS ORDERED THAT: the motions are denied.

FOR THE COURT

Sept 9, 1986
Date

/s/
FRANCES X. GINDHART
Clerk

Filed
SEP 10, 1986